solved. The rule of *Maher*, he asserts, is predicated on the assumption that "the plaintiff would have prevailed on the Section 1983 claim had the plaintiff been allowed to litigate that claim to adjudication." Pet. 8. But "[t]hat assumption," he continues, "is not warranted where the plaintiff has actually litigated, and lost, his Section 1983 claim" before the lower court. *Ibid.*; see *id.* at 13-14.

The Commissioner's argument, however, rests on a fundamental misunderstanding of the basis for the *Maher* rule. Pointing to the legislative history of Section 1988, the Court has explained:

> "In some instances, * * * the claim [supporting an award of] fees *may involve a constitutional question which the courts are reluctant to resolve if [a] non-[fee] claim is dispositive*. *Hagans v. Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, *see Hagans v. Lavine*, *supra*; *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a 'common nucleus of operative fact.' *United Mine Wokers v. Gibbs*, *supra*, at 725."

Maher, 448 U.S. at 133 n.15 (quoting H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976), at 4 n.7 (emphasis added)).

The rule of *Maher* thus is prompted both by general principles of judicial restraint and by the particular policies that underlie Section 1988. The Court has long recognized "the wisdom of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case." *Hagans* v. *Lavine*, 415 U.S. 528, 547 n.12 (1974). See, *e.g.*, *Superintendent* v. *Hill*, 472 U.S. 445, 450 (1985). If a court's failure to resolve a substantial constitutional claim makes fees unavailable when the plaintiff prevails on a related non-fee claim, courts accordingly would be put to an

unpalatable choice: they either would be obligated to engage in otherwise unnecessary constitutional adjudication simply to resolve the plaintiff's entitlement to fees, or they would have to deny fees to plaintiffs who might well have had meritorious civil rights claims.

As the Ninth Circuit correctly recognized, these concerns apply with full force in a case like this one, where the lower court rejected civil rights claims that later were left unresolved by the higher court that ultimately decided the case.[1] In challenging the Ninth Circuit's holding and arguing to the contrary, the Commissioner commits a basic error when he fails to view the fees issue from the perspective of the court that had the last word on the merits of the claims that underlie the request for fees – in this case, from the perspective of *this* Court. Here, this Court granted review *on all three issues* in the case but ultimately found it unnecessary to address the Commerce and Due Process Clauses only because it disposed of the case by holding the HVIRA invalid under the foreign affairs doctrine. The Court thus had both the fee-generating (Commerce and Due Process Clause) and what we are assuming to be the non-fee (foreign affairs doctrine) claims before it when it decided the merits of plaintiffs' suit. That is precisely what triggers application of the *Maher* rule.

So far as *Maher* is concerned, the Ninth Circuit's intervening ruling on the merits regarding the Commerce Clause and due process claims is wholly immaterial. After all, the point of the *Maher* rule is to avoid having the question of en-

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[1] There is no dispute here that the Commerce and Due Process Clause claims advanced in this case by respondents were substantial. The district court ruled for respondents on both claims. The Eleventh Circuit ruled for respondents on an essentially identical due process claim. See *Gerling Global Reinsurance Corp. of Am.* v. *Gallagher*, 267 F.3d 1228 (11th Cir. 2001). And the United States supported respondents' Commerce and Due Process Clause arguments in this Court.

titlement to fees affect the decision-making processes of the court that is entertaining the merits of the plaintiff's suit by forcing that court to resolve a constitutional claim unnecessarily. But the Commissioner's approach would place courts in just that situation. In this case, for example, the Court found it unnecessary to decide plaintiffs' Commerce and Due Process Clause claims; presumably, the Court found it easier, or preferable, or both, to resolve the case on foreign affairs grounds.[2] If the Commissioner were correct, however, the Court would have been obligated to go on to address one of the remaining constitutional claims (or, at a minimum, to reverse its preferred order of addressing the issues before it) simply to settle the plaintiffs' entitlement to fees. The Commissioner thus would turn *Maher* on its head by having the fee tail wag the merits dog.

Alternatively, if the court resolving the merits does not volunteer to decide superfluous constitutional questions, the Commissioner's rule would have the effect of denying fees to prevailing plaintiffs whose substantial constitutional claims were presented to, but not resolved by, the court that had the last word on the merits. But that, too, is just what the *Maher* rule was designed to prevent. "Congress' purpose in authorizing a fee award for an unaddressed constitutional claim was to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a noncon-

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[2] Because the Court's decision turned in part on its construction of executive agreements that it accorded preemptive force (see *Garamendi*, 539 U.S. at 420-428), it may have believed that its approach allowed it to avoid the most difficult constitutional issues in the case, even as to the foreign affairs doctrine itself. See *id.* at 419-420 (although "[i]t is a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption," "the question requires no answer here").

stitutional claim is dispositive." *Smith*, 468 U.S. at 1007. The Commissioner's rule, however, would have precisely that inequitable result whenever a reviewing court finds it unnecessary to reverse an adverse lower-court ruling on the plaintiff's fee-generating claims. Here, for example, the Commissioner would penalize plaintiffs because this Court understandably declined to reach out to decide constitutional questions that were unnecessary to the resolution of the case.

The Commissioner also is wrong in suggesting that there is something anomalous in applying the *Maher* rule when the lower court's analysis rejecting the civil rights claims has not been expressly repudiated by the higher court that ultimately ruled for the plaintiff on non-fee grounds. In this case, after all, this Court *reversed* the Ninth Circuit's judgment and held that at least a portion of its reasoning was incorrect. In those circumstances, it makes perfect sense to say that the remaining portion of the lower court's judgment should not stand as a bar to the award of fees to a party that (a) has obtained all the relief sought and (b) might well have prevailed on the constitutional claims had they been reached by the higher court.[3]

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[3] Moreover, the Commissioner's argument is premised on the false assumption that the Ninth Circuit's Commerce and Due Process Clause holdings continue to "have precedential value." Pet. 19. This Court's reversal of the Ninth Circuit's judgment on the merits means that the court of appeals' prior holdings no longer remain in effect. Cf. *O'Connor v. Donaldson*, 422 U.S. 563, 578 n.12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case"); see also Pet. App 14. In addition, this Court's analysis in *Garamendi* – which concluded that the HVIRA impeded the Federal Government's ability to "speak with one voice" about Holocaust-era insurance claims and repudiated the Ninth Circuit's view that Congress affirmatively approved state laws like the HVIRA (see 539 U.S. at 427-429) – substantially undermined the analysis used

2. *There Is No Conflict In The Courts Of Appeals On The Issue Presented Here*

The Commissioner gets no further with his carefully phrased argument that "numerous courts have acknowledged that a plaintiff who loses on even a 'substantial' Section 1983 claim that is factually related to a non-fee bearing claim is not entitled to fees." Pet. 14-15. In fact, there is no conflict in the circuits on the question here. In each of the appellate decisions the Commissioner invokes (at Pet. 16-18), the court expressing the *last* word on the merits *rejected* the plaintiff's civil rights claim. In such circumstances, the *Maher* principle simply does not apply because the court that ultimately decided the merits did *not* leave the civil rights issue unresolved. As the Ninth Circuit accordingly recognized in rejecting the Commissioner's reliance on these decisions (see Pet. App. 15-16), a rule intended to keep courts from having to decide constitutional claims unnecessarily has no application in cases where the courts found it appropriate *to* resolve those constitutional claims. But just as obviously, the decisions cited by the Commissioner have no bearing in a case like this one, where the higher court did *not* address the fee-creating claims.[4]

The Ninth Circuit's decision in *Mateyko* v. *Felix*, 924 F.2d 824 (9th Cir.), cert. denied, 502 U.S. 814 (1991), cited

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by the Ninth Circuit to reject respondents' Commerce Clause claim.

[4] This Court's decision in *National Private Truck Council, Inc.* v. *Oklahoma Tax Commission*, 515 U.S. 582 (1995), also invoked by the Commissioner (at Pet. 7, 13, 19, 21), rested on a similar basis. There, the Court held fees unavailable under Section 1988 because, given the nature of the plaintiff's claim, "no relief can be awarded pursuant to § 1983." 515 U.S. at 592. Here, in contrast, there is no doubt that Section 1983 *did* provide a cause of action to advance claims under the Commerce and Due Process Clauses.

by the Commissioner (at Pet. 17-18), is typical of the cases on which he relies. There, the plaintiff brought both state and federal claims. Before the district court, the plaintiff prevailed (in part) on his state law arguments, but lost on his federal claims. See 924 F.2d at 825. The court of appeals expressly affirmed the ruling dismissing the federal claims on the merits. *Id.* at 826. Having done so, the court held that attorneys' fees were unavailable because "all Mateyko's federal claims were decided against him." *Id.* at 828. The other appellate decisions cited by the Commissioner involve similar circumstances. See *Luria Bros. & Co., Inc.* v. *Allen*, 672 F.2d 347, 349, 357 (3d Cir. 1982) (plaintiff prevailed before the district court on both federal and state claims; the court of appeals reversed as to the federal claim and therefore held fees unavailable); *Haywood* v. *Ball*, 634 F.2d 740 (4th Cir. 1980) (fees not available where court of appeals previously had rejected the federal claims, see *Haywood* v. *Ball*, 586 F.2d 996, 998-1000 (4th Cir. 1978)); *Bonner* v. *Guccione*, 178 F.3d 581 (2d Cir. 1999) (fees not available where the relief obtained by the plaintiff on her non-federal claim was not equivalent to relief that she sought on her federal claim); *Reel* v. *Ark. Dept. of Correction*, 672 F.2d 693, 696-697 (8th Cir. 1982) (fees not available where the court of appeals remanded the federal issue for further consideration); *Raley* v. *Fraser*, 747 F.2d 287, 290-292 (5th Cir. 1984) (fees not available where the court of appeals rejected the civil rights claim).

In fact, in the almost 30 years since Section 1988 was enacted, it appears that the issue raised by the Commissioner here – availability of fees when the fee-bearing claim is rejected by a lower court but left open by the higher court – has been addressed in only two appellate decisions: this case and a prior ruling of the Ninth Circuit, which reached the same result. See *Carreras* v. *City of Anaheim*, 768 F.2d 1039, 1050 (9th Cir. 1985), abrogated on other grounds by *Los Angeles Alliance for Survival* v. *City of Los Angeles*, 993 P.2d

334 (Cal. 2000); Pet. App. 11 (reading *Carreras* "to support an award of fees where, as here, the court of highest authority to hear a case avoids resolution of a fee-supporting federal claim").[5] The great infrequency with which the issue of *Maher*'s application to the unusual factual setting of this case has arisen militates strongly against review; it is difficult to characterize an issue that has reached a court of appeals only

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[5] The issue appears to have been addressed in only one other reported decision, *Am. Auto. Mfrs. Ass'n* v. *Cahill*, 53 F. Supp. 2d 174, 180-181 (N.D.N.Y. 1999) ("*AAMA*"), which is cited by the Commissioner at Pet. 9, 15-16. In *AAMA*, the plaintiff advanced both statutory and constitutional arguments; the district court rejected both claims; on appeal, the Second Circuit ruled for the plaintiff on statutory grounds without reaching the constitutional issue. See *id.* at 178-179. The district court then held that fees were not available under Section 1988 even though the court of appeals had left open the constitutional issue. *AAMA*, however, is of limited value to the Commissioner. This Court "will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit." R. Stern, *et al.*, SUPREME COURT PRACTICE 237 (8th ed. 2002). Moreover, the district court in *AAMA* acknowledged that there was no case law clearly supporting its analysis (53 F. Supp. 2d at 180) – and, because the *AAMA* court *did* award fees on the plaintiff's statutory claims (see *id.* at 182-186), the Second Circuit had no opportunity to review the district court's conclusions about Section 1988. In addition, the district court offered an alternative ground for its holding that the plaintiff was not entitled to fees on its unreviewed constitutional claims; the plaintiff received "far narrower" relief on its statutory claims than it had sought under the Constitution. *Id.* at 181. In this context, any tension between the Ninth Circuit's decision in this case and a single aberrant district court ruling (which, so far as we know, has never been followed) does not provide a basis for the grant of review by this Court.

twice in three decades as "an important question of federal law" that should be settled by this Court. Sup. Ct. R. 10(c).

3. The Commissioner's Remaining Merits-Based Challenges To The Court Of Appeals' Decision Lack Substance

The various other challenges that the Commissioner raises to the merits of the decision below lack substance and certainly do not warrant review. The Commissioner is wrong in contending that the Ninth Circuit's decision makes the grant of certiorari "a fee-generating event." Pet. 25; see *id.* at 12, 23-24. As the court of appeals explained, "[t]he grant of certiorari does not factor into the prevailing plaintiff calculation – only when the Supreme Court (or the court of highest authority to hear a case) rules in favor of a plaintiff and grants him the relief he sought will that plaintiff be considered prevailing under § 1988." Pet. App. 15 n.2. This Court's grant of certiorari does not dictate the award of fees; under the holding below, it is the Court's ultimate disposition on the merits of the fee-bearing claims before it that determines whether fees are available.

By the same token, the Commissioner is incorrect in arguing that the Ninth Circuit's ruling will frustrate Section 1983's policy by "encourag[ing] plaintiffs to attach meritless Section 1983 claims to routine non-fee bearing claims" in hopes of obtaining fees if they prevail on the non-fee portion of the case. Pet. 9-10. If a civil rights claim truly is insubstantial and is advanced abusively simply to generate entitlement to fees, it would be an easy enough matter for an appellate court to reject that claim on the merits. It is notable that the Commissioner's concern has not proved to be a problem for district courts applying the *Maher* rule, even though the Commissioner agrees that, in the absence of an appeal, fees *are* available when the district court rules for the plaintiff on non-fee grounds while leaving civil rights claims unresolved.

Indeed, it is the Commissioner's rule that would create perverse incentives. Under his approach, a plaintiff who lost on both a state law and a federal civil rights claim in district court, but who believed that it had strong appellate arguments on both claims, might forgo advancing its state-law claim on appeal for fear that the court of appeals would reverse on that ground – which, according to the Commissioner, would make attorneys' fees unavailable. And most fundamentally, denying fees in these circumstances "would frustrate section 1988's purpose to encourage private parties to vindicate their federal civil rights." *Mateyko*, 924 F.2d at 828-829. As *Maher* and *Smith* demonstrate, this policy is effectuated when fees are awarded to a plaintiff who advances unresolved fee-generating claims but prevails in the district court on a non-fee claim. That policy applies in precisely the same way in cases like this one; the happenstance that there was an intervening adverse decision on the fee-generating claim that was left unresolved by the court that ultimately ruled in the plaintiff's favor has no bearing on the utility of awarding fees to prevailing plaintiffs who advance substantial but ultimately undecided constitutional issues. Such an award "'furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues.'" Pet. App. 16 (quoting *Maher*, 448 U.S. at 133).

In fact, this case is one in which there should be no doubt about the propriety of a fee award. The California legislature was warned that it was proposing to pass a statute of dubious constitutionality. When the HVIRA nevertheless was enacted, the Commissioner enforced it in the most aggressive manner, although he was advised that the law was constitutionally flawed and was urged to refrain by federal officials. See pages 2-3, *supra*. After respondents brought suit to vindicate their constitutional rights, the Commissioner litigated the issue relentlessly, forcing respondents to take two trips to

the court of appeals and one to this Court before they finally prevailed on the merits and obtained complete success in their constitutional challenge. These considerations – where the plaintiff is forced to engage in years of burdensome, time-consuming, and expensive litigation to defeat unconstitutional enforcement action – are precisely the ones for which Section 1988 was enacted.

4. The Question Whether The Executive Agreement At Issue In This Case Is Enforceable Under Section 1983 Was Not Decided By The Court Of Appeals And Does Not Warrant Review

The Commissioner also urges the Court to decide whether the Federal Government's preemption of state law pursuant to the Constitution's foreign affairs power creates "rights" under Section 1983. Pet. 25-29. But that issue is not now presented in the case. As the Commissioner acknowledges (at Pet. 25), the Ninth Circuit expressly declined to resolve the question. See Pet. App. 9, 17.[6] Moreover, there is no conflict on this issue in the lower courts. Indeed, so far as we are aware, this case is the only one *ever* to address whether the German Foundation Agreement – or, for that matter, the Constitution's foreign affairs principle – is enforceable under Section 1983. The question presented by the Commissioner therefore plainly does not warrant review.

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[6] As respondents argued below, the foreign affairs principle and the German Foundation Agreement – which was designed, in relevant part, to advance "the [German] companies' interest in securing 'legal peace'" (*Garamendi*, 539 U.S. at 423 (citation omitted)) – *do* create rights, privileges, or immunities that are enforceable under Section 1983.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2005

No. 05-272

FILED
OCT 6 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

JOHN GARAMENDI, in his capacity as Commissioner of Insurance for the State of California,

Petitioner,

v.

GERLING GLOBAL REINSURANCE CORPORATION OF AMERICA, US BRANCH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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TABLE OF AUTHORITIES

Page

FEDERAL CASES

Central Pines Land Co. v. United States, 274 F.3d 881 (5th Cir. 2001) 4

Farrar v. Hobby, 506 U.S. 103 (1992) 5

Maher v. Gagne, 448 U.S. 122 (1980) 1, 4, 5

Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582 (1995) 2

O'Connor v. Donaldson, 422 U.S. 563 (1975) 4

The insurers' brief in opposition to the Commissioner's certiorari petition ("Opp."), if anything, highlights the reasons why this Court should grant review to address an unprecedented decision of the Ninth Circuit ("*Gerling III*"). That decision conflicts with the language and intent of an important federal statute, conflicts with settled principles articulated by this Court and numerous others, and threatens to severely burden government defendants who will now face additional, meritless Section 1983 claims brought by plaintiffs buoyed by the prospect of recovering attorneys' fees even if they lose those claims on the merits.

1. The insurers say that "the relevant rules in this area of the law have long been settled and noncontroversial." Opp. at 6. The Commissioner agrees. Until *Gerling III*, no one would have reasonably thought that a plaintiff who loses his Section 1983 claim on the merits has "prevailed" on that claim, entitling the plaintiff to an award of attorneys' fees under Section 1988. Congress never authorized such an award, and *Maher v. Gagne*, 448 U.S. 122 (1980), certainly does not permit that result. *Maher* only permits an award of fees to a plaintiff who has not had the opportunity to litigate his Section 1983 claim to judgment; it does not grant a windfall recovery of fees to a plaintiff who has litigated and lost that claim. Presumably, until *Gerling III*, plaintiffs have understood that reality and have not often pressed for the recovery of fees after having lost their Section 1983 claim. *Gerling III* now opens that door.

2. The insurers dismissively characterize their loss on their Section 1983 claims as a "wholly immaterial" "happenstance." Opp. at 9, 16. But that loss is anything

but immaterial. It reflects a judicial determination, by a federal court of appeals, that the insurers were not entitled to relief under Section 1983 as a matter of law. Contrary to the insurers' assertion (Opp. at 16), their Section 1983 claims are not "unresolved." Accordingly, there is no basis for considering the insurers to be "prevailing parties" on those claims for purposes of Section 1988 fees. See *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 592 (1995).

3. The insurers assert that unless they are awarded fees here, they will be unfairly "penalized." Opp. at 1, 11. To the contrary, if *Gerling III* is allowed to stand, it is the Commissioner and other defendants who defeat Section 1983 claims brought against them who will be unfairly penalized. *Gerling III* creates an assumption, never before recognized, that the court that ruled against a plaintiff on the merits of his Section 1983 claim was wrong and that the plaintiff would prevail on that failed claim were a reviewing court to address it.

There is no basis for such an assumption. Neither Congress nor this Court has ever suggested that losing litigants are entitled to that assumption. And the fact that the Section 1983 claim satisfies the minimal "substantiality" test (*i.e.*, it is not frivolous) hardly justifies the assumption that the lower court was wrong on the merits and that the plaintiff would prevail on appeal.

4. *Gerling III* has significant practical consequences that justify this Court's immediate attention. Amici, insurance regulators and local governments, have expressed serious concerns about the impact of this unprecedented decision. By expanding the right to attorneys' fees to parties who have lost their Section 1983 claims, *Gerling*

III presents the very real dangers of chilling regulatory activity, burdening local government with costly additional litigation, and exposing public agencies and local government to unwarranted fee awards.[1] Following *Gerling III*, plaintiffs with little prospect of prevailing on a Section 1983 claim have every reason to add such a claim to a run-of-the-mill tort lawsuit or challenge to an administrative action, since they may now be awarded fees even if they lose the Section 1983 claim.

The insurers' response to this increase in meritless Section 1983 suits exposes the fallacy of their position. They say that appellate courts can deal with such claims by addressing and rejecting them on the merits. Opp. at 15. But that is precisely the kind of judicial work that they elsewhere say the courts should avoid for prudential reasons. See Opp. at 8-9.

5. The insurers' protests notwithstanding (Opp. at 15), *Gerling III* also reflects a significant intrusion on this Court's certiorari process. As the insurers themselves conceded in their Ninth Circuit briefing (App. 30-31) and Judge Graber inferred in her concurrence (App. 18), this Court's grant of certiorari on the Section 1983 claims was

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[1] *Gerling III* is not limited to situations in which a plaintiff loses both the fee and non-fee claims in the lower court and then prevails on the non-fee claim in the appellate court without obtaining an appellate ruling on the fee claim. As the National Association of Insurance Commissioners explains in its amicus brief (at page 6), *Gerling III* also applies when the plaintiff has won on its non-fee claim in the lower court. Significantly, *Gerling III* will chill a defendant's willingness to appeal on that non-fee claim, since the plaintiff can then cross-appeal on the Section 1983 claim and recover fees if the appellate court affirms the defendant's loss on the non-fee claim and does not address the Section 1983 issue. *Id.*

essential to the award of fees. Without that grant, the Ninth Circuit could not have characterized those claims as "unaddressed" for purposes of applying *Maher* to this case and ruled that the insurers were entitled to an award of attorneys' fees under Section 1988.

The insurers also argue that this Court's grant of certiorari is not a fee-generating event under *Gerling III* because "it is the Court's ultimate disposition on the merits of the fee-bearing claims before it that determines whether fees are available." Opp. at 15. That argument is puzzling, since this Court expressly did not address the merits of the insurers' Section 1983 claims in *Garamendi*, and the Court's decision not to address those claims is precisely what the insurers argue provides the basis for a fee award under *Maher*.

6. The insurers are simply wrong in asserting that the Ninth Circuit's Commerce Clause and due process rulings do not continue to have precedential value. Opp. at 11 n.3. They cite a case, *O'Connor v. Donaldson*, 422 U.S. 563, 578 n.12 (1975), that holds only that a lower court opinion loses its precedential value when it has been vacated. However, the law recognizes a critical distinction between vacating and reversing a lower court judgment. Reversal of a decision on one ground does not affect the precedential value of the balance of the decision. See *Central Pines Land Co. v. United States*, 274 F.3d 881, 893-894 and n.57 (5th Cir. 2001). Were this not the law, there would be no point in referring to a decision as "reversed on other grounds," as no aspect of the decision would have any value. The insurers simply ignore this critical distinction.

This Court reversed the Ninth Circuit on foreign affairs preemption grounds only; it did not vacate the Ninth Circuit's Commerce Clause and due process rulings. As Judge Graber recognized (App. 19 n.1), the Ninth Circuit's Commerce Clause and due process rulings continue to have precedential effect.

7. Section 1988 permits a plaintiff to recover fees only if he has prevailed on his Section 1983 claim.[3] Congress, and this Court in *Maher*, recognized that there are limited circumstances where it is perceived to be unfair to deny fees to a plaintiff who has never had the opportunity to obtain a ruling on his Section 1983 claim. Neither Congress nor any other court has ever suggested, let alone held as the Ninth Circuit has in *Gerling III*, that a plaintiff who has lost his Section 1983 claim on the merits in a lower court is entitled to fees when a reviewing court does not address that failed claim.

The *Maher* rule, contrary to the insurers' repeated suggestion (Opp. at 8-9, 12), is not one that awards fees simply as a convenience to courts that wish to avoid constitutional issues. Instead, it addresses a specific and limited perceived unfairness visited on a plaintiff who has never had his day in court on his Section 1983 claim. That unfairness does not exist where the plaintiff has litigated and lost his Section 1983 claim in at least one court.

Under *Gerling III*, however, that loss is ignored as though it never happened. As the amici have expressed,

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[3] A plaintiff must prevail (or be assumed to have prevailed) on his Section 1983 claim to recover fees under Section 1988. In *Farrar v. Hobby*, 506 U.S. 103, 106, 107, 112 (1992), cited by the insurers (Opp. at 6-7), the plaintiff established that his civil rights had been violated.

that perverse result will improperly chill regulatory activity, and expand litigation against and impose significant risks upon local governments and regulators.

The petition for certiorari should be granted.[3]

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[3] The issue of the insurers' entitlement to fees is ripe and is not in an interlocutory posture. The parties agreed to adjudicate the entitlement issue prior to any proceedings to determine any fee award amount, and the district court and Ninth Circuit have proceeded to decide the entitlement issue.